1983

Research Planning, Inc. v. Bank of Utah : Brief of Plaintiff And Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

RESEARCH-PLANNING, INC.	:	
Plaintiff and appellant,	:	
vs.	:	Case No. 18968
BANK OF UTAH,	:	
Defendant and respondent	:	

BRIEF OF PLAINTIFF AND APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, HONORABLE DEAN E. CONDER, JUDGE

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NATURE OF THE CASE

This case was brought under Section 9 of the Uniform Fiduciaries Act, enacted in Utah as U.C.A. § 22-1-9, infra, p. 3, to recover damages suffered when the defendant bank paid its customer's personal checks in excess of the available balance in the customer's account and applied a customer's deposit of funds, held by the customer as a fiduciary for the plaintiff, to offset the bank's advances to the customer.

DISPOSITION IN THE LOWER COURT

The case was tried to the district court without a jury. Judgment was entered in favor of the defendant bank on the grounds (1) the bank did not have actual knowledge that its customer was committing a breach of his obligation as a fiduciary, (2) an action is done in "bad faith" under the statute when it is done dishonestly and (3) the plaintiff, Research-Planning, did not prove bad faith on the bank's part.

RELIEF SOUGHT ON APPEAL

Research-Planning seeks the following relief on appeal:

1. That the judgment be reversed.

2. That judgment be ordered in favor of the plaintiff on the following grounds:

   (a) The term "bad faith" under the statute, U.C.A. § 22-1-9, does not require dishonesty in fact in the sense of fraud, a high degree of moral guilt or evil motives.

   (b) The meaning to be given to the term "bad faith" under the statute is the meaning given to the same term under the Uniform Negotiable Instruments Act.

   (c) The plaintiff has met the burden of proof of "bad faith" under the statute.

STATUTE INVOLVED

U.C.A. § 22-1-9, with the pertinent portions underlined, reads as follows:

> Deposits in fiduciary's personal account.—If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal, if he is empowered to draw checks thereon, or of checks payable to his principal and endorsed by him, if he is empowered to endorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

STATEMENT OF THE CASE

On August 6, 1980, Mr. Roger LeFevre, an officer of First Capital Mortgage Loan Corporation, opened a personal account of the corporation in the Eagle Gate branch of the bank. Mr. LeFevre was known to the assistant manager of the branch, Roger Barth, who had required a signature guarantee on the check Mr. LeFevre deposited at that time. (R. 407.)*

Barth's duties included operations, the teller line, the new accounts desk and the checking department as well as making loans. (R. 406, 407.) After the First Capital account was opened, Mr. Barth and Mr. LeFevre communicated with each

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* References are to the pages of the record on appeal for the reporter's transcript.

other regarding the balance in the account. In response to Mr. LeFevre's inquiry as to the balance in the account, Mr. Barth wrote to him on August 14, saying that "your account has a balance of $106,513.90. However, all of these funds are uncollected and no funds will be released until they are collected. * * * " (R. 408; Ex. 7.) One of the items in the uncollected balance was a $95,500 check to First Capital that was never paid. (Ex. 8; R. 409.)

In the morning of August 19, 1980, a cashier's check for $260,000 (Ex. 3) was deposited in the First Capital account. (R. 359-361.) The check had been given to First Capital by plaintiff, Research-Planning, the day before to be held in escrow (Ex. 21), pursuant to a loan agreement (Ex. 2, R. 353) between Research-Planning and its borrower, R. K. Buie & Associates. The money was to be used by Buie at a real estate closing that was to take place on the 19th or soon thereafter. (R. 352-356.) The money was to be disbursed when fee title to the land was obtained by Buie (R. 372) and when First Capital's lien on the property was subordinated to a first deed of trust in favor of Research-Planning (R. 353-356). First Capital was a fiduciary for Research-Planning as to the deposit and the statute, U.C.A § 22-1-9, applies to the deposit of the money in the bank.*

It was the bank's policy that all deposits of over $1,000 be reviewed. The $260,000 check was on Mr. Barth's desk when Steven Alder, who was a partner of Buie and also its lawyer, came into the bank the same morning of the 19th of August to "make sure the money had been deposited and to inquire into the nature of the deposit." (Tr. 373-375.)

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* Defendant's response to Request for Admissions Nos. 1 and 3. (Answer to plaintiff's third set of interrogatories and request for admissions, R. 106, 107.)

During their conversation, Mr. Barth showed the $260,000 cashier's check to Mr. Alder and told him that it had been deposited in a general account and would be paid on a first-come, first-served basis. (R. 374-377, 430.) Mr. Alder testified that he told Mr. Barth that the money was "for a very specific purpose. * * * They are for a closing that is to be held this afternoon or possibly tomorrow that will involve the addition of additional funds from First Capital Mortgage & Loan to this $260,000. And then that those two amounts together were to be transferred to a company in Ogden—a title company for purpose of closing a real estate transaction. * * * I said that they were escrowed funds and that they had been escrowed for that purpose which was to close this real estate transaction later that day, hopefully." (R. 376-377.)

Mr. Barth testified that he was told the deposit was for a specific purpose but not that it was for a "real estate transaction" or that it should go to a "title company". (R. 430, 431.) The references to a real estate transaction and a title company are the only conflicts in the testimony of Mr. Alder and Mr. Barth.

When Mr. Alder asked Mr. Barth for the balance in the account, he was told that the information could not be given. Being bothered that the account was not a trust account, Mr. Alder then said to Mr. Barth, with some urgency in his voice, "Well, I want you to understand that if there are any draws against this check, that that is not to happen and to please call me." To this Mr. Barth said "Okay" and wrote Mr. Alder's name on the calendar on his desk. Not having a business card with him, Mr. Alder wrote his telephone number on the calendar. Mr. Alder also said, "If there are any questions or draws against this account, I would like to know. It's very important that this money be closed today." When Mr. Barth said "Okay", Mr. Alder took no further action and left the bank feeling "satisfied that

the money was there which was my original concern. I was also satisfied that it would still be there or I would hear otherwise." (R. 377, 378.) Mr. Barth testified that he had no reason to disbelieve Mr. Alder and thought he was telling the truth. (R. 429, 446.)

The deposit of the $260,000 was a "provisional" credit to the First Capital account on the 19th and would not appear on the bank's computer until the following day. Mr. Barth was "watching" the account and acknowledged that the deposit could have been held in suspense "if the bank had had any reasons for concern about the thing * * * ." (R. 426-428.) The provisional credit given for the deposit to the First Capital account on the 19th was not available for withdrawal as of right and could have been revoked, as between the bank and First Capital, until the bank received a settlement for the deposit through banking channels. U.C.A. § 70A-4-213 (4).

In response to a second request from Mr. LeFevre as to the balance in "his" account, Mr. Barth again wrote to Mr. LeFevre saying, "The balance on your account is currently $102,668.51. However, there is a $95,500 check being charged back to your account today, leaving available a balance of $7,168.51." (R. 408; Ex. 8.) Mr. Barth wrote the second letter to Mr. LeFevre because the bank had learned that a $95,500 check drawn on another bank and deposited in the First Capital account was being "returned by the bank it was drawn on" and that Mr. LeFevre "would not be able to have access to that fund." (R. 409, 410.)

The knowledge that the $95,500 check was coming back resulted in a hold being placed on the account on the 18th or 19th of August. Two checks drawn on the account, one for $9,260 (Ex. 15) and one for $415.96 (Ex. 6), which were received on the 19th were returned the following day as having been "drawn on

uncollected funds". (R. 415-417, 435, 440, 442; Ex. 6.)

Seven other checks drawn on the First Capital account, totalling $214,164.34, were paid on the 19th. The seven checks paid on the 19th, some of them collection items (R. 433), were the following: a check for $80,000 to Clarence Samuelson (Ex. 9) and another for $27,500 to Natures Estates (Ex. 14), both drawn on August 12; a check for $10,843.46 to Alma L. and Loil R. Keiser and a check for $1,930.69 to R. Dean Hill and Jean O. Hill, both drawn on August 15 (Ex. 13); and checks for $25,500 to National Title Guaranty (Ex. 10), $66,000 to First Security Bank (Ex. 11) and $2,390.19 to Bank of Utah or R. Dean Hill or Jean O. Hill (Ex. 12) all of which were drawn on August 18. (R. 410-415.) The seven checks were paid while the "hold" was still on the account and even though the $260,000 deposit was only a provisional credit to the First Capital account.

Five of the checks paid on the 19th, four by cashier's checks (Exs. 9, 10, 11 and 12) and one by a wire transfer (Ex. 14), totalled $201,806.15. At least four of these payments were handled by Mr. Barth who signed three* of the cashier's checks and authorized the wire transfer (R. 410, 411, 415). The two other checks that were paid (Ex. 13) apparently came to the bank and were paid "through normal banking channels" without personal attention by Mr. Barth. (R. 422.)

A second hold was placed on the account "late in the afternoon on the 19th * * * ." (R. 416-417, 419, 422.) Mr. Barth testified, in response to questions from the bank's counsel, that the second hold was placed on the account because a check for $250,000 was presented for payment late that afternoon. (R. 421, 434,

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* It was not possible to obtain a copy of the fourth cashier's check from the bank to ascertain who signed it.

435, 437.) Mr. Barth also testified, in response to questions from counsel for Research-Planning, that the bank "had some concern with the account, the way that LeFevre was handling it, there was some risk to the bank if he was at that time, the bank—he was evidently writing checks that he did not have money to cover. * * * We had been watching the account since the bank had found out that the $95,500 was coming back. * * * Our concern is that the bank, myself, might sustain a loss. * * * Because of the way he was using the account, the bank might be liable for a loss." (R. 442, 443, 448, 449.)

Because of the holds on the account, the check for $250,000 was refused and a check for $20,000 (Ex. 19), which was drawn on the 19th and presented after the 3:00 o'clock p.m. cut off on that date, was not paid until August 21. (R. 420, 421.)

In spite of the two holds on the account, Mr. LeFevre, on August 20, was able to obtain a cashier's check drawn on the account and payable to himself in the amount of $5,000. (Ex. 17.) Mr. Barth first told Mr. LeFevre that he could not have the money because the account was on hold but, when Mr. LeFevre "forced" the matter, he received the check. (R. 419.) Thereafter, while "the hold was still on the account", additional checks drawn on the account were paid, to the extent of virtually all of the $260,000 provisional credit. (R. 420, Ex. 5.)

Mr. Barth acknowledged that he knew that money held by an escrow agent is to be used for a specific purpose and not for other purposes. (R. 424, 425.) He said that he did not inquire whether the four large checks paid by cashier's checks and the wire transfer in which he had participated were connected with the real estate closing Mr. Alder had talked about. (R. 423, 424.) Mr. Barth acknowledged that he could have asked Mr. Alder "for further information, but, I didn't." (R.

446, 425.) Mr. Barth said that the presentation of the $250,000 check in the afternoon of the 19th made him think that he should call Mr. Alder and that he had intended to call Mr. Alder but he "didn't have time." Mr. Barth was also "going to call" Mr. Alder "on the 20th, but I didn't because of a letter we received from Roger LeFevre stating that no information must be given out on the account." (R. 435; Ex. 18.)

The bank's statement of the First Capital account shows that the deposit of the check provided by Research-Planning was finally credited to the First Capital account so that no overdraft existed in the account. (Ex. 5.)

ARGUMENT

In addition to the liability which arises from actual knowledge, a second ground of liability under the statute, supra, p. 3, arises when a bank "pays the amount of the deposit" of fiduciary funds or any part thereof upon the personal check of the fiduciary * * * with knowledge of such facts that its action in * * * paying the check amounts to bad faith."

The district court held that "an action is done in bad faith when it is done dishonestly" and that Research-Planning "failed to meet the burden of proof required by said statute." (Conclusions of law, Nos. 2 and 3; R. 205, 206.)

Counsel for Research-Planning conceded at the trial that there was no proof of bad faith in the sense of conduct characterized by fraud or complicity on the part of the bank in a breach of trust. If, however, "bad faith" under the statute does not require dishonesty in fact, then Research-Planning has proven that the bank acted in bad faith.

I

A BANK DOES NOT HAVE TO ACT DISHONESTLY TO ACT IN BAD FAITH UNDER THE STATUTE

A. The term "bad faith" as it is used in the Uniform Fiduciaries Act was intended to have the same meaning that the term had in the Uniform Negotiable Instruments Act:—It appears that the district court's interpretation of "bad faith"—as requiring dishonesty—was based upon its reading of this court's opinion in Sugar House Finance Co. v. Zions First National Bank, 21 U.2d 68, 440 P.2d 869 (1968). The issue in that case was whether negligence absent bad faith makes for liability under the Act. This court noted that "bad faith" is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. Davis v. Pennsylvania Co. For Insurance On lives, Etc., 12 A.2d 66 (Pa. 1940)". This court also noted that "bad faith" is also defined as "some motive of self-interest. National Casualty Co. v. Caswell & Co., 45 N.E.2d 698 (Ill. 1943.)" It is evident from a review of the briefs filed in Sugarhouse Finance Co. that this court was not provided with information concerning the history of the Uniform Fiduciaries Act which shows that the drafters of the Act did not intend dishonesty in fact to be a requirement for "bad faith" under the Act.

Since the Utah statute is an enactment of the Uniform Fiduciaries Act, it should be helpful to consider what the drafters intended the term "bad faith" to mean in the Act. The underlying purpose of the Act has been stated to be the harmonizing of the common law theory, that one deals witn a fiduciary at his peril, with the provisions of the Uniform Negotiable Instruments Act. Wysowatcky

v. Demar-Willys, 281 P.2d 165 (Colo. 1955). From the general proposition that one who knowingly assists a fiduciary in a breach of duty is liable to the beneficial owner of the fund, 76 Am. Jur. 2d, Trusts, § 309, the law had evolved to the point in 1921 where the courts had held a depositary bank chargeable with constructive notice and the duty to make inquiry to endeavor to prevent a diversion of fiduciary funds. Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454, 477-480 (1921).

Professor Scott thought the doctrine of constructive notice had been carried to an unreasonable extent and argued his position as follows (pp. 480-481):

> It is easy to sit down at leisure after the event and to see how a cautious and inquiring banker might have discovered the depositor's misconduct. It would not require the acumen of a Sherlock Holmes to follow the clues which may have been afforded. But should bankers be turned into detectives in order to prevent depositors from acting in violation of their obligations to third persons? It must be remembered also that frequently all the clues are not known to any one employee of the bank, and that the facts known to any one employee are not sufficient to arouse suspicion. It must be remembered that the processes of receiving deposits and paying checks are processes in which many employees of the bank take each his separate part. If no one of the employees has knowledge of any breach of trust the bank should not be held liable merely because it appears that at some stage by piecing together all the facts known to different employees a breach of trust would become more or less apparent. The bank is in no way to blame for receiving deposits or allowing withdrawals merely because all the facts known to several employees would, if known to one employee, have aroused a suspicion of misconduct by the depositor. The bank it is submitted should not be liable unless some officer or employee had actual knowledge of the depositor's misconduct or knowledge of facts so clearly indicating such misconduct as to show that the bank was guilty of bad faith.

Professor Scott's reference to "facts so clearly indicating such misconduct as to show that the bank was guilty of bad faith" was a reference to the meaning of the term "bad faith" under the Uniform Negotiable Instruments Act.

When the First Tentative Draft of the Uniform Fiduciaries Act was presented to the conference on uniform laws, it contained a definition of the term "bad faith" as follows:

> And a thing is done in "bad faith" when it is in fact done dishonestly.

Those words were omitted from the Act by vote of the conference. Uniform Laws Annotated, Master Ed., Vol. 7A, p. 130 (1978).

What the drafters of the Uniform Act did in rejecting the proposed definition of "bad faith" was, in effect, to adopt Professor Scott's argument and to "borrow" the term, with its settled meaning, from the Uniform Negotiable Instruments Act. Trenton Trust Co. v. Western Sur. Co., 599 S.W. 2d 481, 492 (Mo. 1980); Maryland Casualty Co. v. Bank of Charlotte, 340 F.2d 550, 554 (4th Cir. 1965).

B. It is bad faith for a bank to remain passive in the face of facts clearly suggesting fiduciary misconduct, particularly where the bank has a monetary interest in the transaction.—The term "bad faith" appears in section 56 of the Uniform Negotiable Instruments Act which, in pertinent part, is very similar to section 9 of the Uniform Fiduciaries Act:

> To constitute notice of infirmity in an instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. (Emphasis supplied.)

The term "bad faith" is not defined in the Uniform Negotiable Instruments Act but it had had a settled meaning in the law of negotiable instruments while that Act was in use and long before that Act was adopted. See Rightmere, Bad

Faith in Negotiable Paper, 18 Mich. L. Rev. 355 (1920), where the history of the term and its application in the law of negotiable instruments is discussed at length. The author of the article referred to says that the rule of "bad faith was firmly fixed in American jurisprudence" by the decision of the Supreme Court of the United States in the case of Goodman v. Simonds, 20 How. 343 (1857), which arose over an accepted and endorsed bill of exchange. In that case the Supreme Court rejected a jury instruction which would have defeated the title of a holder for value because of his want of care and caution in ascertaining the facts with regard to the drawer's interest in the bill and his authority to use the bill for his own benefit. The Goodman case established the rule that if the facts relied upon to discredit the title of a holder are outside of the instrument and if actual knowledge of the defect in title is not found, the holder recovers unless he took the instrument in bad faith; and willfully shutting one's eyes to the means of knowledge which one knows are at hand is plenary evidence of bad faith. In the words of the Goodman opinion (20 How. at 366-367):

> the proper inquiry is, did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? and if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen. Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand * * * for the reason that such conduct whether equivalent to notice or not, would be plenary evidence of bad faith. (Emphasis supplied.)

Consistent with Goodman v. Simonds, it was held by the New York Court of Appeals that "bad faith in taking commercial paper does not necessarily involve furtive motives, for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who * * * owed him nothing, in payment of a claim that he held against someone else." (Emphasis supplied.) Ward v. City Trust Co., 84 N.E. 585, 589 (N.Y. 1908).

In the case of In re Hopper-Morgan Co., 156 Fed. 525, 530 (D.C. N.Y. 1907), the court observed that where a taker of a note "* * * knew, or had good reason to believe that [his payor] received the note from [the original payee]; and that [the original payee] had no right to sell it, and that the note could only be used as collateral, and that it was originally issued for a purpose other than to be used in part payment of property of any kind, * * *" that failure to make inquiry regarding the note was bad faith. (Emphasis supplied.) The court went on to observe that circumstances may be such as to impose an active duty of inquiry and investigation and, if such duty is not performed, it may be conclusive evidence of bad faith. 156 Fed. at 530.

The willful shutting of the eyes, without any necessity for a furtive or dishonest motive, has been the test of "bad faith" applied by the courts under the Uniform Fiduciaries Act except in cases like the Davis case, supra, p. 9, where the courts, "smitten with the notion of symmetry in the law", have "concluded that bad faith, being the antonym of good faith, is an act done dishonestly." Guild v. First National Bank of Nevada, 553 P.2d 955, 958 (Nev. 1976). As the Nevada court said, at p. 958, "logic of this sort, however, is less satisfactory than examining the underlying purposes of the [Uniform Fiduciaries] Act in order to ascertain what definition of 'bad faith' best accords with the legislative intent

* * *."

The position of the courts that have given to the term "bad faith" in the Uniform Fiduciaries Act the same meaning that the term had under the Uniform Negotiable Instruments Law is summarized in the following quotation from Trenton Trust Co. v. Western Sur. Co., 599 S.W.2d 481, 492 (Mo. 1980):*

> The Uniform Fiduciaries Act does not define "bad faith," but it does define "good faith." This statute provides that "[a] thing is done 'in good faith' * * * when it is in fact done honestly, whether it be done negligently or not." * * * Obviously, mere negligence is insufficient to amount to "bad faith." However, it is not entirely accurate to equate "bad faith" with "dishonesty," if the latter term is taken to denote a high degree of moral guilt, or evil motives. * * *
>
> The term "bad faith" is borrowed from the Uniform Negotiable Instruments Act. * * * In Ward v. City Trust Co., 192
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> N.Y. 61, 84 N.E. 585 (1908), the bank accepted a check drawn payable to a corporation in payment of a personal debt of a corporate executive. The court interpreted the term "bad faith"
>
> as it was used in the Uniform Negotiable Instruments Act as follows:
>
> > Bad faith in taking commercial paper does not necessarily involve furtive motives, for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who * * * "owed him nothing, in payment of a claim that he held against some one else."
>
> * * * The test of "bad faith" under the Uniform Negotiable Instruments Act has been said to be whether it is commercially unjustifiable for the person accepting a negotiable instrument to disregard and refuse to learn facts readily available. Where the circumstances suggestive of the fiduciary's breach become sufficiently obvious it is "bad faith" to remain passive. * * *

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* Many of the cases cited are omitted from the lengthy summary for sake of brevity.

In Davis v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 337 Pa. 456, 12 A.2d 66 (1940), the court inquired in the proper construction of the term "bad faith" as it used in the Uniform Fiduciaries Act:

> At what point does negligence cease and bad faith begin? The distinction between them is that bad faith, or dishonesty is, unlike negligence, wilful. The mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith. (Union Bank & Trust Co. v. Girard Trust Co., 307 Pa. 488, 500, 501, 161 A. 865), unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction,—that is to say, where there is an intentional closing of the eyes or stopping of the ears.

* * *

If "bad faith" requires conduct that is in fact dishonest, there would be no reason for the second ground of liability under section 9 of the Act, since a bank that acted dishonestly with fiduciary funds would be liable in any event.

More than any other single factor, the existence of a monetary interest on a bank's part coupled with reason to suspect a misappropriation has been held to be proof of bad faith under the Uniform Fiduciaries Act. Many cases on this aspect of "bad faith" are cited and summarized in the Trenton opinion as follows (599 S.W.2d at 493):*

> The fact that one dealing with a fiduciary benefits financially from the transaction is a factor to be considered in determining whether he acted in bad faith under the Uniform Fiduciaries Act. Where a bank engages in transactions with a fiduciary and has "both reason to suspect a misappropriation by a fiduciary and a monetary interest in the continuance of such activity," the

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* Citations omitted.

> bank acts in bad faith. * * * Both Southern Agency, 452 S.W.2d at 103, and Cassel v. Mercantile Trust Co., 393 S.W.2d 433, 438 (Mo. 1965) suggest that if the banks had "benefited from the proceeds" of the fiduciary's misappropriation or "received any of the fruits" thereof, the banks could have been held liable to the principal even absent actual knowledge of a breach of fiduciary obligation. Accord, General Insurance Co. v. Commerce Bank of St. Charles, 505 S.W.2d 454, 457 (Mo. App. 1974). See Lucas v. Central Missouri Trust Co., 350 Mo. 593, 166 S.W.2d 1053, 1058 (1942), which states that a bank "may incur liability and be compelled to make good deposits by a fiduciary * * * by appropriating the fund, either with or without the fiduciary's consent, to the payment of the latter's debt to the bank."

For the foregoing reasons, it is submitted that proof of "bad faith" under the Uniform Fiduciaries Act requires only proof that the bank remained passive, disregarding the means of knowledge, in the face of facts clearly suggesting fiduciary misconduct. Where the bank has a monetary interest in the transaction, that fact must be considered in determining whether the bank willfully closed its eyes in bad faith under the Act.

II

THE EVIDENCE SHOWS THAT THE BANK ACTED IN BAD FAITH

This is not the "frequent" case Professor Scott wrote of, supra, p. 11, where "many employees of a bank take each his part" in the "receiving of deposits and paying checks" and all of the facts "are not known to any one employee of the bank." In this case, the assistant manager, whose duties included the new accounts desk, the teller line, the checking department and operations, knew the following facts and was personally involved in the following activities concerning the account:

1. The account was only thirteen days old. (Ex. 5.)

2. In that short period of time the account was being "watched". Of four checks presented before August 19 (three on the 13th and one on the 14th) two had been refused because drawn on uncollected funds.*

3. The customer was told that the account had a large amount of uncollected funds and that the available balance on August 19 was less than $8,000. (R. 408, 428; Exs. 7, 8.)

4. A check deposited in the account for $95,500 was being returned by the bank it was drawn on. (R. 409, 410.)

5. A "hold" on the account on the 19th of August, which was effective to stop the payment of two checks received evidently in the normal course of business (Exs. 15, 16; R. 415-517, 435, 440, 442), was ignored when checks totalling $201,806.15 were paid that day by the assistant manager (R. 410-417).

6. A second "hold" was placed on the account on the same day. The "holds" were used as authority to deny an officer of the customer a cashier's check to himself—until he "forced" the matter. (R. 416, 419, 422.)

7. Information was given to Mr. Barth that the deposit of $260,000 and additional funds was to go for a specific purpose. This was believed by the assistant manager who also knew that the available balance in the account was less than $8,000. (R. 374-377, 408, 430-431; Ex. 8.)

8. The four checks paid by the assistant manager were all drawn

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* See Ex. 6, a list of the activities account showing checks paid and refused. (R. 407.) The four checks were for $331.27, $574.12, $348.12 and $5,000.00. The last two were refused.

before August 19 and each was payable to a different person. (Exs. 9, 10, 11, 12, 14.)

9. Mr. Barth was "concerned" with the way the account was being used. He thought checks were being written on the account that were not covered and that the bank might sustain a loss. (R. 442, 443, 448, 449.)

10. Mr. Barth thought he should call Mr. Alder and intended to call him on August 19 and on August 20 for further information, but did not. (R. 425, 435, 446.)

Mr. Barth believed what Mr. Alder told him (R. 429, 446) and heard all of Mr. Alder's testimony at the trial. Mr. Barth did not deny that he was told that the $260,000 with "additional funds" was for a "specific purpose" as testified to by Mr. Alder. Mr. Barth did not deny that he was told the deposit was held in escrow by the bank's customer, that he had Mr. Alder's telephone number and that he said he would call Mr. Alder if there were any questions or draws on the account.

All of the foregoing facts show a closely watched, troubled account, the receipt of a single deposit of funds held in escrow or, at least, intended for a specific purpose, virtually all of which was used by the bank to effect the payment of checks payable to different parties and, most of them, drawn before the deposit was made. All of the facts were known to one person who was an officer with broad authority in the bank.

The circumstances of this case present a clear example of a willful disregard of available information. Mr. Barth thought on the 19th and again on the 20th that he should call Mr. Alder for "further information" and intended to do so but did not. (R. 425, 435, 446.) Certainly the bank had "notice of facts which, if unexplained, would show" Ward v. City Trust Co., supra, p. 143, that the $260,000

deposit was to be used for a specific "purpose", In re Hopper-Morgan Co., supra. p. 145 other than the payment of checks already drawn and presented to the bank, supra, p. 7, and a cashier's check to Mr. LeFevre, supra, p. 8-9. Clearly, Mr. Barth had enough information to warrant further inquiry and the "means of knowledge which he" knew were "at hand". His failure "to take any steps to see if [the checks] were connected with the 'specific purpose'", it is submitted, was "plenary evidence of bad faith". Goodman v. Simonds, supra, p. 14.

There is further reason to conclude that the bank acted in bad faith. A telephone call to Mr. Alder would not have been in the bank's interest if it did not want to look to First Capital for repayment of the advances it had made on the 19th and 20th of August. If Mr. LeFevre "was writing checks that he did not have money to cover", someone would "sustain a loss". (R. 442, 443, 448, 449.) If what Mr. Alder said was true, the $260,000 deposit was not intended to cover the advances. The use of the deposit to satisfy the advances served to eliminate its customer's debt to the bank and was, therefore, a direct financial benefit to the bank. This benefit the bank took to itself without any inquiry to Mr. Alder from whom the bank could only have learned that the deposit was not the customer's to use for its own purposes, least of all to pay a debt to the bank.

The "provisional" credit of the $260,000 deposit to the First Capital account could have been left in that status or "held in suspense" as Mr. Barth testified if there had been "any reason for concern". (R. 427, 428.) If the bank should argue that it would be liable to its customer if it did not pay the checks immediately, such is not the case. The bank returned four checks (one on the 14th, one on the 18th and two on the 19th) and delayed payment on a fifth check from the 19th to the 21st without liability. The provisional credit was not available "for withdrawal

as of right" to the customer on the 19th and could have been revoked until the settlement as between the banks involved had become final. U.C.A. § 70A-4-213 (1) (a). It is submitted that what occurred was a decision, to borrow Mr. Barth's words, "to make sure that the bank was not going to end up in a negative balance situation." (R. 420.)

The bank's decision to take advantage of the $260,000 deposit rather than charge a large overdraft to its customer's account to cover the advances of the 19th and 20th, coupled with all of the facts known to one officer of the bank, and the unused opportunity to learn more is proof that the bank acted out of self interest and, therefore, in bad faith with respect to the deposit.

The bank was not an impartial observer. It is not being faulted for having made the wrong choice between its customer and a third party in the handling of an account where there were sufficient funds to protect the bank. In this case, the bank was at risk. In that position, with information available, the bank could not close its eyes and act in good faith.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case should be remanded for entry of judgment in favor of the plaintiff.

Respectfully, submitted,

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing brief was mailed to the following this 4th day of April, 1983:

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